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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 756

ALFRED L. SEAVEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully presents:

I

Summary Statement of Matter Involved

Petitioner was convicted of perjury in violation of Section 231 of Title 18 of the United States Code, and judgment of sentence to imprisonment for a period of four months was imposed by Hon. George A. Welsh, United

States District Judge for the Eastern District of Pennsylvania. The judgment was affirmed by the United States Court of Appeals for the Third Circuit. The opinion of the Court is contained in the certified copy of the record filed with this Court (R. 36).

The record discloses the following salient facts:

Petitioner was tried on an indictment charging that on July 25, 1946, he testified before a Grand Jury of the United States that he did not make any payments to any officers or employees of the War Shipping Administration, and that he made no payments to Mr. Frank Sales. The indictment further charged that, in truth, petitioner did pay money upon one or more occasions to an employee or officer of the War Shipping Administration (R. 3a, 4a).

Government's Evidence

The official court reporter testified from the notes of the grand jury proceedings that petitioner had appeared before the Grand Jury and had testified that he had made no payments to any officers or employees of the War Shipping Administration and none to Frank Sales (R. 6a).

Wilhelmina Azzarano testified that she had been bookkeeper for Chemical Cleaning Process Company in 1942 and 1943, and that petitioner had been general manager. She identified a cashbook and testified that certain entries regarding checks for transactions with Chemical Cleaning Process Company were in her handwriting. With regard to an entry for August 17, 1942, she testified that petitioner had told her that it was a commission for the Maritime Commission. With regard to two entries for August 24, 1942, she testified that both were for commissions, and that petitioner had asked her to draw them. She identified four other entries for the years 1942 and 1943. Three of them were marked with an "S." She testified that "S"

stood for Frank Sales and that petitioner had told her that the cash was for Mr. Sales. She also testified that she had seen Fifty Dollars ($50.00) pass between petitioner and Sales at a Christmas Party at the Harbor Inn, Philadelphia, on December 24th 1944 (R. 7a, 8a).

Frank Sales, former marine surveyor and former assistant local manager of the United States Maritime Commission, testified that the only money he ever received from petitioner was One Hundred and Twenty-five Dollars ($125.00), which was handed him in an envelope in the Edison Hotel, Philadelphia, one day in November, 1944 (R. 10a).

At the conclusion of the testimony of Sales, the Government rested, and petitioner's motion for a judgment of acquittal, on the ground that the special rule applicable to perjury cases had not been complied with, was overruled (R. 10a), although Mr. Sales and Mrs. Azzarano had contradicted rather than corroborated each other, and the book entries had corroborated neither.

Defendant's Evidence

Petitioner categorically denied having paid any money and testified that he had testified truthfully before the Grand Jury (R. 11a).

Charge of the Court

The Court submitted the case to the jury on three different theories in the following order:

(a) The theory that the testimony of Mrs. Azzarano as to the Harbor Inn "payment" on December 24, 1944, coupled with the testimony of sales as to the Edison Hotel "payment" in November 1944 constitute the testimony of two witnesses within the meaning of the "two-witness rule" (R. 16a).

(b) The theory of defendant's points for charge, that (i) "some one single payment to Sales must be proved either by two witnesses or by one witness and corroborating circumstances," and (ii) the testimony of Mrs. Azzarano regarding the Harbor Inn "payment" coupled with the testimony of Sales regarding the Edison Hotel "payment" did not constitute the required proof of one single payment, and (iii) "Nor do Mr. Sales and Mrs. Azzarano constitute two witnesses to any one payment" (R. 19a).

(c) When the jury returned for further instructions the Court not only resubmitted the first theory, but also gave the case to the jury on a third theory, to wit that the books could constitute evidence corroborating the testimony of Mrs. Azzarano (R. 22a, 25a, 26a). Thus the Court said (R. 26a):

> "The Government also says that by reason of the books of the Company that employed the defendant, that it is corroboration; in other words, that Mrs. Wilhelmina Azzarano is corroborated by the books that she produces on these various dates in the course of business showing the payments that were made allegedly to give to a Government agent.
>
> That raises the whole question of fact for you, and if you believe that those payments were made by Mrs. Wilhelmina Azzarano to the defendant and that he gave those moneys to the Government witness, any or all of them, that would be a question for you to decide, and you could find him guilty on that."

An exception was properly noted (R. 23a, 24a, 27a).

A verdict of guilty was returned. A motion for judgment of acquittal, or a new trial, was denied. Petitioner was sentenced to four months in prison (R. 11a).

As related above, the United States Court of Appeals for the Third Circuit affirmed the judgment and sentence.

II

Basis of Jurisdiction

The jurisdiction of this Court is sustained by Section 1254 (1) of the Code of Judiciary and Judicial Procedure, 28 U. S. C. A. 1254 (1). The decision sought to be reviewed is a final judgment of the United States Court of Appeals for the Third Circuit, filed on March 17, 1950, affirming the judgment and sentence of the United States District Court for the Eastern District of Pennsylvania.

The questions involved are substantial because the Trial Court's instructions to the jury permitted a verdict of guilty of perjury upon the oath of a single witness, uncorroborated by circumstances.

III

Questions Presented

1. Is defendant guilty of perjury where in a judicial proceeding he testified that he never made any payments to a certain person and that person testifies to one payment in November, 1944, but says it was the only one, and another witness testifies to a different payment on December 24, 1944 and identifies book entries in her own handwriting allegedly relating to seven payments allegedly made in 1942 and 1943?

2. Is it reversible error in a perjury case to charge the jury that book entries which of themselves were irrelevant without explanation and which are explained only by the witness who made them furnish corroboration of other testimony of that witness sufficient to warrant conviction?

3. Is it reversible error to charge the jury that testimony by one witness as to one payment made to him by defendant plus testimony by another witness as to another payment

by defendant to the first witness warrants a conviction of perjury for having testified that no payment was made to the first witness?

4. As a matter of law can accomplices be deemed to corroborate each other?

IV

Reasons Relied upon for the Allowance of the Writ

Petitioner seeks the writ for the special and important reasons that the Court of Appeals has decided an important question of Federal law in a way probably in conflict with applicable decisions of this Court, and has sanctioned a departure by the District Court from the accepted special rule in perjury cases.

WHEREFORE, your Petitioner, Alfred L. Seavey, respectfully prays that a Writ of Certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court, for its review and determination, a full and complete transcript of the record of all proceedings therein; and that the order of the United States Court of Appeals for the Third Circuit, affirming the judgment and sentence, be reversed, and that your Petitioner have such other and further relief in the premises as to this Court may seem just and proper.

THOMAS D. MCBRIDE,
MICHAEL VON MOSCHZISKER,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below

The opinion of the Court of Appeals is contained in the certified transcript filed with this Court (R. 36).

Statement of Jurisdiction, Questions Presented and Facts

For brevity these will not be repeated here. They appear in the petition to which this brief is annexed.

Argument

Conviction was permitted under erroneous instructions as to the special rule applying in perjury cases.

(a) *The Testimony*

The official court reporter Comer read his notes (R. 6a). They showed that defendant told the Grand Jury that he did not make any payments on his own behalf, or on behalf of Kunzig or anyone else, to any officers or employees of the War Shipping Administration, and that he did not make any such payments to Frank Sales. This is the only "testimony" which the indictment charged as being perjurious (R. 4a).

Mrs. Azzarano identified a cash book (R. 7a) as containing entries in her handwriting regarding checks drawn in connection with transactions with Chemical Cleaning Process Company. In themselves, the entries appeared perfectly innocent. With regard to an entry for August 17, 1942, Mrs. Azzarano testified, however, that Seavey had stated that it was a commission for the Maritime Commission (R. 7a). With regard to two entries for August 24, 1942 she testified that both were for commissions and that defendant had asked her to draw them. She identified four

other entries for 1942 and 1943 (R. 7a, 8a). Three of them were marked with an "S." She testified that "S" stood for Sales and that defendant had told her that the cash was for Mr. Sales. She also testified that she had seen $50 pass between defendant and Sales at a Christmas party at the Harbor Inn, Philadelphia, on December 24, 1944 (R. 8a).

Frank Sales testified that the only money he ever received from defendant was $125 which was handed him in an envelope in the Edison Hotel, Philadelphia, in November 1944 (R. 10a).

(b) *The Charge of the Court*

The Court submitted the case to the jury on three different theories in the following order:

The theory that the testimony of Mrs. Azzarano as to the Harbor Inn "payment" on December 24, 1944, coupled with the testimony of Sales as to the Edison Hotel "payment" in November, 1944, could constitute the testimony of two witnesses within the meaning of the "two-witness rule" (R. 16a).

The theory of defendant's points for charge, that (i) "some one single payment to Sales must be proved either by two witnesses or by one witness and corroborating circumstances," and (ii) the testimony of Mrs. Azzarano regarding the Harbor Inn "payment" coupled with the testimony of Sales regarding the Edison Hotel "payment" did not constitute the required proof of one single payment, and (iii) "Nor do Mrs. Sales and Mrs. Azzarano constitute two witnesses to any one payment" (R. 19a).

When the jury returned for further instructions the Court not only resubmitted the first theory, but also gave the case to the jury on a third theory, to wit, that the book entries in Mrs. Azzarano's handwriting, which had been authenticated, identified and explained only by her, constituted

evidence corroborating the testimony of Mrs. Azzarano (R. 22a, 25a, 26a). Thus the Court said (R. 26a):

> "The Government also says that by reason of the books of the company that employed the defendant, that it is corroboration; in other words, that Mrs. Wilhelmina Azzarano is corroborated by the books that she produces on these various dates in the course of business showing the payments that were made allegedly to give to a Government agent.
>
> That raises the whole question of fact for you, and if you believe that those payments were made by Mrs. Wilhelmina Azzarano to the defendant and that he gave those moneys to the Government witness, any or all of them, that would be a question for you to decide, and you could find him guilty on that."

An exception was properly noted (R. 23a, 24a, 27a).

(c) *The Law*

In *Weiler* v. *United States*, 323 U. S. 606, this Court held that it is error in a perjury case to refuse to charge that the testimony of one uncorroborated witness is not enough. At page 609, the Opinion of this Court indicated that what is needed is evidence specifically corroborating some one event testified to by the witness whose testimony is sought to be corroborated. Thus the Court said:

> "Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon 'an oath against an oath.'"

Furthermore, this Court said at page 610:

> "Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged per-

jurious statement; (2) that the corroborative evidence is trustworthy."

In petitioner's case, Mr. Sales testified that the only money he received was at the Edison Hotel in November of 1944, while Mrs. Azzarano testified that she saw Sales receive money from the defendant at the Harbor Inn on December 24, 1944. The witnesses contradicted each other. Indeed it appears that one of them perjured himself or herself. Therefore, they obviously did not substantiate or corroborate each other's testimony. Nor did the book entries corroborate either the testimony of Mrs. Azzarano or the testimony of Mr. Sales. For the book entries related to alleged payments in 1942 and 1943 only. Therefore, the test laid down in the Weiler case was not met. We maintain that the proper rule is that of *Lea* v. *The State,* 64 Miss. 278 (1886) cited at page 18 of *Johnson* v. *State,* 122 Miss. 16, which is cited with approval in the footnote at pages 626, 627 of *Hammer* v. *United States,* 271 U. S. 620, the case on which this Court relied in *Weiler* v. *United States, supra.* Lea had been indicated for falsely testifying that he had not unlawfully sold liquor to Cromwell, Gibson, Bowie or McDowell. In reversing judgment of conviction the Court said at page 283:

> "By the first instruction given for the State, the jury was permitted to treat the several and separate sales which different witnesses testified had been made by appellant, at different times, as corroborative evidence of each other. This was error. Proof of either assignment of perjury contained in the indictment, by two witnesses, or by one witness and corroborating circumstances, would have supported conviction; but the better opinion in such case is, that proof of one assignment is not corroborated by proof of another, even when all the perjuries assigned are committed at the same time and place. 1 Greenleaf on Evidence, Section 257 a;

Williams v. Com., 91 Pa. St. 493; Reg. v. Parker, 1 Car. & Marsh. 639."

In *Regina* v. *Parker,* 1 Car. & Marsh. 639, 174 Eng. Rep. 669, defendant was charged with perjury in that he stated in an affidavit that he had paid all the debts proved under his bankruptcy. Several creditors were called. Each proved the nonpayment of his own debt. A verdict of not guilty followed the charge of Tindal, C. J. who instructed the jury that there were not two witnesses to any of the debts mentioned in the indictment.

In *Williams* v. *Commonwealth,* 91 Pa. 493, the sheriff of Armstrong County had been convicted of perjury. The indictment alleged that in his oath of office he had sworn that he had made no illegal election expenditures. In reversing a conviction, the Court said at pages 501, 502:

> "The explanation ought to have been that the Commonwealth is required to prove by two witnesses or one witness, and corroborative evidence, at least one corrupt payment, contribution or promise which the defendant is charged with having made or paid; and, though each of several of such acts be proved by a single witness, if none be proved by two witnesses or by one witness, and corroborative proof of circumstances, there could not be a conviction. We think the learned judge so intended; yet it is urged that he permitted the jury to treat the several acts as corroborative of each other—they should have been clearly instructed that proof of a corrupt act by one witness was not corroborative evidence of another which was proved by a different witness."

In *United States* v. *Palese,* 133 F. 2nd 600 (Third Circuit), defendant had testified before the grand jury that he had not paid any person for voting. He was indicted for perjury. Wheatley testified defendant had given him $2 for his vote. Mrs. Jackson testified he had paid her for her

vote. In affirming a conviction the Court (Maris, J.) said at page 602 with regard to Mrs. Jackson's testimony:

> "It is true, as the defendant urges, that this testimony did not corroborate Wheatley's testimony that the defendant had paid him, Wheatley, for voting."

To that extent the *Palese* case supports our contention that Mrs. Azzarano and Sales did not corroborate each other.

But, in affirming the conviction, the Court also said at page 602:

> "But the payment to Wheatley, the individual, was not the crucial fact. Mrs. Jackson's testimony, if believed, did tend, as did Wheatley's, to establish the fact that the defendant did pay persons for voting. It, therefore, was sufficient to corroborate the only material fact established by Wheatley's testimony, namely, that the defendant's assertion that he had not paid any person for voting was false."

We submit that the decision in *United States* v. *Palese,* 133 F. 2d 600, is wrong and therefore defendant should be granted judgment of acquittal. If necessary we distinguish that case on the ground that it did not involve "corroboration" of one accomplice by another. But the decision is wrong anyway. Everybody agrees that where there is only one witness, the circumstances must corroborate the very facts that he testified to. On the same reasoning, where there are two witnesses one of them must corroborate the very facts that the other testified to. Mrs. Azzarano and Sales failed to do that.

Parenthetically we invite the attention of the Court to the fact that the *Palese* case was one of those relied on by the Court of Appeals in *United States* v. *Weiler,* 143 F. 2d 204, 206, fn. 5. The Court's decision in that case was reversed by this Court. 323 U. S. 606. It would appear that

departures from the special rule in perjury cases are not encouraged.

But, as we have already demonstrated, the Court permitted a verdict of guilty in petitioner's case on the theory that Mrs. Azzarano and Mr. Sales corroborated each other and, also, on the alternative theory that the books corroborated Mrs. Azzarano. We submit that both theories were wrong.

If either is wrong, it follows that defendant is entitled to a new trial. Where two alternative theories of guilt are submitted, one correct and the other incorrect, it is impossible to tell which the jury followed and hence the judgment must be reversed. *Kotteakos* v. *United States,* 328 U. S. 750; *Bollenbach* v. *United States,* 326 U. S. 607; *Williams* v. *North Carolina,* 317 U. S. 287; *Stromberg* v. *California,* 283 U. S. 359. This is particularly clear if the theory with regard to the books is incorrect. This was the theory that was given the jury after it had returned for further instructions. It seems clear that it must have confused the jury. The last instruction a jury receives is the one that it is most likely to remember. It is particularly important that such instructions be carefully weighed and properly stated. As this Court said in *Bollenbach* v. *United States,* 326 U. S. 607, 611:

> "The Government suggests that the judge's misconceived 'presumption' was 'just what it appears to be, a quite cursory, last-minute, instruction on the question of the necessity of knowledge as to the stolen character of the notes—and nothing more.' But precisely because it was a 'last-minute instruction' the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were 'hopelessly deadlocked' after they had been out seven hours. 'In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its

> proper conduct and of determining questions of law.' Quercia *v.* United States, 289 U. S. 466, 469, 77 L. Ed. 1321, 1324, 53 S. Ct. 698. 'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr *v.* United States, 153 U. S. 614, 626, 38 L. Ed. 841, 845, 14 S. Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.' ''

An additional reason why the books could not corroborate Mrs. Azzarano is that nobody had written anything in the books except Mrs. Azzarano. Nobody identified the books except Mrs. Azzarano. Nobody authenticated the books except Mrs. Azzarano. Nobody testified as to the entries except Mrs. Azzarano. Nobody testified as to what "S" stood for except Mrs. Azarrano. Nobody explained or interpreted the books except Mrs. Azzarano. Nobody linked defendant with the entries or with the cash transfers for which the entries allegedly stood except Mrs. Azzarano. Unexplained by the testimony of Mrs. Azzarano the books demonstrate nothing. Therefore, to permit the books to corroborate Mrs. Azzarano is to allow her to corroborate herself and hoist herself by her own bootstraps and this the law does not permit.

In support of our position we cite the following case:

In *Regina* v. *Boulter,* 5 Cox. Cr. C. 543 (Court of Criminal Appeal, 1852), an indictment for perjury alleged that the defendant falsely swore that only one quarter's rent was due from him to his landlord in June, 1851. The landlord swore that five quarters' rent was due at that time and produced a book kept by himself in which were entries of the transactions made at the time of their occurrence. Held, conviction quashed. At page 546 Coleridge, J., said of the idea that the

book could corroborate the witness "It is corroborating him by himself."

Nor do the books corroborate Sales. They indicate nothing with regard to the money he said defendant gave him in 1944.

And there is an additional reason why Mrs. Azzarano and Mr. Sales cannot have corroborated each other. They were accomplices of defendant and of each other. Sales because he allegedly received the money from defendant, Mrs. Azzarano because she allegedly supplied defendant with money and disguised its purpose on the books knowing that it was to be given to Sales. See *Commonwealth* v. *Polise,* 81 Pa. Super. 69, 73.

As a matter of law accomplices cannot be deemed to corroborate each other. Therefore, the testimony of Mrs. Azzarano coupled with the testimony of Sales is not sufficient for a conviction of perjury and it was error to charge that it was sufficient.

As authority for the rule that accomplices cannot corroborate each other, we cite the following:

Commonwealth v. *Simon,* 44 Pa. Superior Ct. 538, 541-543, in which the Court said:

> "The second paragraph is as follows: 'As to the second ordinance, there of course, was the testimony of Stewart that he had talked to Mr. Simon before; that he had told him that there would be money in this for him, and he would get more than the others. I think he said he had arranged with him as to the amount, or told him the amount. At any rate, he says he knew that Simon came to his place for the purpose of getting money, and the money had been put in an envelope there, and that is the last he knew of it. He said whether he got the money he could not positively say, but he knew that he had gone, and that the envelope was gone. That of course, is very positive corroboration, if you believe it.'

It is a conceded fact in the argument that the Stewart above referred to was an accomplice of Klein and the above quotation from the charge raises the very important question of whether one accomplice corroborates another, or, in other words, where two accomplices testify in support of a criminal charge against a third person, can the court say to the jury that one accomplice corroborates the other. We find that many of the text-writers, as well as the authorities in this state, and in several of our sister states, are strongly against the charge of the court to the effect that Stewart's testimony corroborated Klein.

In 1 Greenleaf on Evidence, sec. 381, it is said: 'If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied and the same confirmation is required as if there were but one.' In 3 Wigmore on Evidence, sec. 2059, note A: 'It is clear, as to testimonial source of the corroboration, that it must be independent of the accomplice himself; it must rest on other than his credit. It is usually said that the testimony of another accomplice is not sufficient; yet the circumstances may sometimes render it sufficiently trustworthy.' See also Taylor on Evidence, sec. 970; Underhill on Criminal Evidence, sec. 75. In Com. *v.* Clemmer, 190 Pa. 202, the same doctrine seems to have been recognized by our Supreme Court. In that case the defendant's thirteenth point was, 'The testimony of Elizabeth DeKalb and Charles C. Kaiser, Jr., both being self-confessed accomplices, cannot be considered by the jury as corroborating each other; the testimony of each must stand alone, and it would be unsafe to convict the prisoner on such testimony unless such testimony is corroborated by other facts and circumstances independent of the testimony of both.' The court below so instructed the jury and the opinion of the Supreme Court appears to approve the same.

Our own case of Com. *v.* Craig, 19 Pa. Superior Ct. 81, clearly recognizes that the testimony of accomplices should be corroborated and if not, then the jury should be advised that it is unsafe to convict on such uncor-

roborated testimony. In Cox *v.* Com., 125 Pa. 94, Mr. Justice Paxson, for the Supreme Court, said: 'The learned judge below did his full duty, under all the authorities, in cautioning the jury as to the danger of convicting upon the uncorroborated evidence of an accomplice. He was not bound to instruct them to acquit in the absence of corroboration.' Many additional cases might be cited from other states to the effect that if two or more accomplices are produced as witnesses, they are not deemed to corroborate each other. We, therefore, conclude that the learned judge erred in his instruction to the jury as set forth in the paragraph above quoted from the fourth assignment to the effect that the testimony of Stewart was, of course, very positive corroboration, if you believe it. So much of the fourth assignment as is above quoted is sustained."

See also Commonwealth *v.* Chrostowski, 112 Pa. Super. 466, 468, 469, 171 A. 901; Wigmore, 3d Ed., Volume VIII, Section 2059 at page 326; Wharton's Criminal Evidence, 11th Ed., Volume II, Section 749 at page 1262.

Conclusion

The testimony of Sales and Mrs. Azzarano contradicted each other, for the former testified that the *only* payment was in one place in November, 1944, while the latter testified to a payment alleged to have been made in another place on December 24, 1944.

The book entries did not substantiate the testimony of either witness, for all book entries related to transactions in 1942 and 1943.

THEREFORE, certiorari should be granted. *Weiler* v. *United States,* 323 U. S. 606.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 756

ALFRED L. SEAVEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 36-40) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 17, 1950 (R. 40). The petition for a writ of certiorari was filed April 15, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in a prosecution of a witness for perjury in testifying before a grand jury that he had never paid money to a government officer, the two witness rule was satisfied by the testimony of two witnesses, each testifying alone as to a separate instance in which the defendant made such a payment.

2. Whether the testimony of one of the witnesses as to a payment of money by petitioner was sufficiently corroborated by entries she had made in a cash book.

STATUTE INVOLVED

Section 125 of the Criminal Code, 18 U.S.C. (1946 ed.) 231 (now 18 U.S.C. 1621), provided:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

STATEMENT

On or about July 25, 1946, a federal grand jury for the Eastern District of Pennsylvania was investigating the activities of Henry J. Kunzig and

the Chemical Cleaning Process Company in connection with the bribery of certain government officials in relation to war contracts. Petitioner, who testified before this grand jury, stated that he did not make any payments on his own behalf or on behalf of Kunzig or anyone else to any officers or employees of the War Shipping Administration, and that he did not make any such payments to Frank Sales. He was later indicted in one count for perjury in so testifying. (R. 3-5.)

At petitioner's trial, the court reporter at the grand jury hearing stated that after petitioner took the oath, he testified that he had been acting general manager in the Philadelphia office of Chemical; that to the best of his knowledge he had never made any payments on behalf of Kunzig, the owner of Chemical, or anyone else to any officers or employees of the War Shipping Administration or to Sales; and that he had neither directed anyone else to make such payments, drawn money from Chemical or Kunzig for that purpose, nor requested Mrs. Azzarano to pay him money to make such payments (R. 5, 6).

Mrs. Azzarano, Kunzig's sister and bookkeeper for Chemical in 1942 and 1943, identified numerous entries in the Government's Exhibit 1, Kunzig's cash book. An entry of August 17, 1942—"commission, Martime Commission, cash $50"—was for a check petitioner told her to make out as a commission. Regarding two entries of August 24,

1942—"commission 37.50" and "Chemical Cleaning Company, commission 37.50"—she testified that petitioner asked her to draw $75 for "commissions." She also testified that the letter "S" in an entry of October 27, 1942—"commissions S. 543.90"—meant Sales, to whom she "was told it was to be turned over," and that she put in the "S" for her own reference because petitioner told her "to draw it for that purpose." (R. 7.) The same was true as to a similar entry of March 5, 1943, on a $200 commission for Sales. An entry of November 10, 1942, reading, "Chemical Cleaning, commission P and S 457.99," referred to a withdrawal for Sales and Pioneer (another company owned by Kunzig) which petitioner told her to make. Petitioner asked her to draw $350 for Sales on April 19, 1943, and this was covered by an entry of that date reading, "Chemical Cleaning, commission, $350." Mrs. Azzarano also testified that she had seen petitioner give $50 to Sales at the Harbor Inn at a Christmas party in December 1944. (R. 8.) She thought this money was the same five ten-dollar bills which she had given to her brother, after which he took them out of his pocket, gave them to petitioner, and remarked that he did not think it was "a nice time to ask for it" (R. 9).

Frank Sales, former assistant local manager of the United States Maritime Commission, testified that in 1944 he went to lunch with petitioner sev-

eral times. At the Edison Hotel in November 1944, according to Sales' testimony, petitioner gave him an envelope containing a "present" which he found to be $125. Sales stated that this was the only time he received money from petitioner. (R. 10.)

The jury found petitioner guilty (R. 29) and he was sentenced to four months' imprisonment (R. 31). The Court of Appeals affirmed the conviction (R. 40).

ARGUMENT

Petitioner contends that the Government's proof did not meet the requirement (see *Weiler* v. *United States,* 323 U.S. 606) that the falsity of a statement made under oath be established by the testimony of two independent witnesses or of one witness and corroborating circumstances. It is asserted that the two witnesses, Sales and Mrs. Azzarano, did not corroborate, but contradicted each other; and that they were accomplices of petitioner and of each other, so that as a matter of law their testimony could not be mutually corroborative. (Pet. 10, 15).

The trial judge, after reviewing the evidence (R. 12-14) and instructing the jury as to the two witness rule (R. 15-16), stated the contrasting positions of the parties (R. 16-17):

> The position that Mr. McBride takes on behalf of the defendant is this. There were two acts of perjury, two payments made which

are the subject matter of this perjury inquiry. One was the fifty dollars, or whatever it may be, that was turned over in the presence of Mrs. Azzarano, and the other amounts which she says were obtained by the defendant for the express purpose of giving them to Mr. Sales, and the other event is the $125 that was paid to Mr. Sales which she [sic] under oath said he obtained.

Mr. McBride's position is, there being two separate events here, two separate payments, that the Government, under the two-witness rule in perjury, is obliged to prove to you by two witnesses, or one witness and corroborating circumstances, each one of those transactions.

* * * * *

The Government constitutes those two acts of alleged payment as being the one offense of paying money to a public officer, and they say that under the two-witness rule they have met the requirements of the law as laid down by the Supreme Court, because they have called Mrs. Azzarano to prove one alleged fact and Mr. Sales to prove another alleged fact, but it is only the one offense of paying money to a public officer. * * * There is only the one count here and it involves what the Government calls the gist or gravamen of the offense of having paid money to a public officer, about which Mr. Seavey is charged with having sworn falsely, and I am sustaining the Government on that point, and I will also affirm their point.

Later, however, after some general instructions (R. 17-18), the judge reiterated in general terms the two witness rule (R. 18-19) and then gave the following instructions requested by defense counsel (R. 19):

> Some one single payment to Sales must be proved either by two witnesses or by one witness and corroborating circumstances. I affirm that point.
>
> Two. Even if you believe Mr. Sales' testimony as to the money he says the defendant gave him after they had lunched together at the Edison Hotel, and even if you believe Mrs. Azzarano's testimony as to the money she says she saw the defendant give Sales at the party at the Harbor Inn, Mr. Sales' testimony and the testimony of Mrs. Azzarano cannot corroborate each other as to the making of any one single payment. I affirm that point.
>
> Three. Nor do Mr. Sales and Mrs. Azzarano constitute two witnesses to any one payment. I affirm that point.

The judge then said that he had given the jury "the two theories of this case" and instructed them to "apply that law to these facts and bring in your verdict accordingly" (R. 19-20).

After the jury had deliberated awhile, they returned with the following question (R. 21):

> Your Honor—One juror would like to know if two witnesses must both agree on one given amount of money paid to Mr. Sales, or if one amount by one witness and another amount by

> another witness would be the two witnesses required for perjury.

The judge replied that this question embodied the real issue of law involved in the case and stated (R. 21-22):

> * * * I answer that question "Yes." That is to say, if you believe that one amount by one witness and another amount by another witness occurred, if you believe that those two amounts were paid in the manner described, that would be the two witnesses required by the law as it is laid down by the Supreme Court in the points for charge that were given to me by the Government, which I affirmed in my general charge.

The judge then adverted to the Government's position that only one act of perjury was involved which it claimed was proved by the testimony of Sales and Mrs. Azzarano, respectively, as to the two separate payments, and to the Government's further contention that Kunzig's cash book contained corroborating evidence (R. 22). In answer to a further question by a juror whether "one witness on this instance and one witness on that would not constitute the two," the judge in his final instructions again adverted to the disagreement between the parties on this issue and reiterated his instruction sustaining the Government's position that such proof satisfied the two witness rule, adding that if there had been separate counts of perjury the rule would require two witnesses or one

witness and corroborating circumstances as to each charge (R. 25-26). Finally, the judge elucidated on the Government's alternative contention "that Mrs. Wilhelmina Azzarano is corroborated by the books that she produces on these various dates in the course of business showing the payments that were made allegedly to give to a Government agent [Sales]," and instructed the jury (R. 26):

> That raises the whole question of fact for you, and if you believe that those payments were made by Mrs. Wilhelmina Azzarano to the defendant and that he gave those moneys to the Government witness, any or all of them, that would be a question for you to decide, and you could find him guilty on that.

The judge concluded with the admonition that the facts were for the jury to decide and asked whether the colloquy had clarified the issues for the jury. The juror who had been asking the questions replied in the affirmative and added, "I wanted it made clear—the two witnesses on a single instance for conviction for perjury" (R. 26-27). It is clear that this last remark was not a statement of a question lingering in the juror's mind, but a statement of the issue which had been troubling him, for it was in the same vein as his original questions and the judge had clarified the point by instructing the jury that in the circumstances of this case testimony by different witnesses as to separate payments would satisfy the two witness rule (see pp. 7-8, *supra*).

Thus, any doubts engendered by the judge's original instructions as to the quantum of proof required in this case were dissipated by his final instructions in response to the jury's questions. The case was finally submitted to the jury on the alternative theories (1) that the testimony of Sales and Mrs. Azzarano as to the respective payments by petitioner to Sales, if believed, was sufficient under the two witness rule, and (2) that Mrs. Azzarano's testimony, together with the entries in the cash book, if believed, was also sufficient. These instructions were not, as petitioner contends (Pet. 8-9), inconsistent with the earlier instructions, given at his request, (1) that the Government was required to prove some one single payment to Sales by two witnesses or one witness and corroborating circumstance, (2) that Sales' and Mrs. Azzarano's testimony was not mutually corroborative, and (3) that these two witnesses were not witnesses to any one payment, except to the extent that they permitted the jury to accept the testimony of both witnesses as to the respective payments as satisfying the two witness rule. We shall show, as petitioner says we must (Pet. 13-14), that both of the alternative theories upon which the case was finally submitted to the jury were legally correct.

1. In respect of the first of the two alternative theories embodied in the trial judge's final instructions, it is important to note that petitioner was

not prosecuted for passing bribes on a number of specific occasions. He was charged in one count with having stated falsely under oath that "he did not make any payments * * * to any officers or employees of the War Shipping Administration * * * [or] to Mr. Frank Sales." (R. 4.) If there had been separate counts, one alleging perjury as to the $125 payment at the Edison Hotel, and another as to the $50 payment at the Harbor Inn, petitioner's argument, as the trial judge recognized (see pp. 6, 8-9, *supra*), might be persuasive.[1] But that clearly is not the situation here.

The instant case, as the Court of Appeals held (R. 38), is governed by its earlier decision in *United States* v. *Palese,* 133 F. 2d 600. Cf. *Commonwealth* v. *Davis,* 92 Ky. 460; *Regina* v. *Hare,* 13 Cox. Crim. Cas. 174. In *Palese* the defendant denied before a grand jury that he had paid any person for voting at an election. Two witnesses, Wheatley and Mrs. Jackson, testified that Palese had paid them. The Court of Appeals recognized that while the testimony of Mrs. Jackson did not corroborate Wheatley's testimony that Palese had paid him, it "did tend, as did Wheatley's, to establish the fact that the defendant did pay persons for voting." 133 F. 2d at 602. In *Palese* the court

[1] It is significant that in the following cases, upon which petitioner strongly relies (Pet. 11), there were multiple rather than one-count perjury indictments: *Regina* v. *Parker,* 1 Car. & Marsh. 639, 174 Eng. Rep. 669; *Williams* v. *Commonwealth,* 91 Pa. 493.

also explicitly rejected the standard for corroborative evidence laid down in *Williams* v. *Commonwealth,* 91 Pa. 493, relied upon by petitioner (see Pet. 11), "namely, that the particular circumstances testified to as indicating falsity must be corroborated and not merely the falsity of the oath itself." 133 F. 2d at 603. The court said: "We think it would be highly undesirable to intensify the rigor of the rule [of evidence in the proof of perjury] by engrafting upon it the strict standard laid down in the *Williams* case as to the nature of the evidence which can be accepted as corroborative." (*id.,* 603-604.)[2]

Just as in the *Palese* case, the government, in the instant case, was required to prove, in conformity with the rule in perjury cases, only the falsity of petitioner's oath, i.e., that his statement that he had never made any payments upon behalf of his employer to a government official was false. The Government did prove by the two witnesses, Mrs. Azzarano and Sales, that petitioner was a perjurer. Even though Mrs. Azzarano's testimony as to the $50 payment to Sales did not specifically

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[2] Petitioner by indirect suggestion seeks to minimize the weight of the *Palese* decision by stating that it was relied upon by the court below in *United States* v. *Weiler,* 143 F. 2d 204, 206, fn. 5, which was reversed by this Court, 323 U. S. 606. The assertion is made "that departures from the special rule in perjury cases are not encouraged." (Pet. 12-13.) *Palese* was merely cited by the Court of Appeals in *Weiler* in connection with an observation that the two-witness perjury rule has been the subject of criticism. *Palese* is entirely consistent with this Court's ruling in *Weiler,* and is not a "departure" from the two witness rule.

corroborate Sales' testimony as to the $125 payment, and vice versa, the testimony of both witnesses did corroborate all that was necessary for conviction, i.e., the falsity of petitioner's statement under oath that he had never made any such payments.[3]

The rule for which petitioner contends would lead to absurd results. For example, if five or any given number of witnesses had testified to receiving payments from petitioner, but none of them had seen money pass to any of the others, under petitioner's theory there would be no corroboration, and therefore no conviction for perjury would be possible. We do not believe such a result should be countenanced.

In this connection, the court below rightly dismissed petitioner's contention (Pet. 15-17) that Mrs. Azzarano and Sales were accomplices of petitioner and of each other and therefore could not, as a matter of law, corroborate each other. As the court said: "They are not 'accomplices' but even if they were it is not to the crime of perjury. There is nothing to this point" (R. 38). There is noth-

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[3] Petitioner argues that the witnesses contradicted each other, because Sales testified that the only money he received from petitioner was at the Edison Hotel, while Mrs. Azzarano testified that she saw Sales receive money from petitioner at Harbor Inn (Pet. 10). However, as the court below pointed out (R. 38), "the jury was not bound to accept or reject Sales' testimony in its entirety; it could believe as true the story of the bribe and reject his testimony that he had received no others," citing *United States* v. *Palese*, 133 F. 2d 600, 603 (C.A. 3), and *United States* v. *Reginelli*, 133 F. 2d 595, 598 (C.A. 3), certiorari denied, 318 U. S. 783.

ing in the record to show that Mrs. Azzarano and Sales were accomplices of petitioner in the crime of perjury; there is no evidence that petitioner committed perjury at their instigation or that they procured the perjured testimony. Cf. *Holmgren* v. *United States,* 156 Fed. 439, 444 (C.A. 9), affirmed, 217 U. S. 509, 523.

2. Mrs. Azzarano testified that she actually saw petitioner give $50 to Sales at the Harbor Inn at a Christmas party in 1944 (R. 8). The court below held that the various book entries made by her as the company bookkeeper, "as they stand, corroborate the direct testimony of payment by the defendant" and "constitute circumstantial corroboration even without [her] explanation" of the entries (R. 39). While the book entries for 1942 and 1943 did not specifically corroborate the fact of the $50 payment which she witnessed at Harbor Inn in 1944 (see Pet. 10), they were, with their references to commissions to the Maritime Commission and to "S", circumstantial corroboration of the fact that other similar payments were made to Sales. The sufficiency of the corroboration was a question for the jury to decide. *Weiler* v. *United States, supra,* 323 U. S. at 610.

In addition, Mrs. Azzarano explained from the book entries which she made what the various "commissions" were (R. 7-8). Petitioner argues that this should not have been permitted, citing *Regina* v. *Boulter,* 5 Cox Crim. Cas. 543, because

it allowed Mrs. Azzarano to corroborate herself. We think the court below correctly distinguished the *Boulter* case on the ground that there the books were not actually in evidence, as in the instant case, but were merely used by the witness to refresh his memory (R. 39).

We see nothing derogatory in the fact that Mrs. Azzarano herself identified the cash book and explained the entries (see Pet. 14). She was the person who made the entries, apparently in the regular course of business, and was thus the person best qualified to explain them. So far as the record shows, there was no objection either to the admission of the book or Mrs. Azzarano's explanation of the entries. Neither did petitioner deny in his testimony that the entries or the symbol "S" referred to payments to Sales. In the circumstances of this case, the book entries constituted in a very real sense independent corroboration of Mrs. Azzarano's testimony as to the $50 payment to Sales.

CONCLUSION

The decision below is correct and there is no conflict of federal decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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